UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM McFARLAND, Petitioner and Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Respondent and Appellee.	)	No. 21085

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

JOYCE F. NEDDE
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1348

Attorneys for Respondent-Appellee

TOPICAL INDEX

TABLE OF CASES

Table of Cases (Continued)

TEXTS, STATUTES AND AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM McFARLAND, Petitioner and Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Respondent and Appellee.	)	No. 21085

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253. Proceedings in forma pauperis are authorized by Title 28, United States Code section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On September 28, 1958, appellant, a prisoner at San Quentin State Prison, was convicted in the Superior Court of Los Angeles County of violating

California Penal Code section 187 (murder in the first degree), section 211 on three separate counts (robbery), and section 664 (attempted robbery) (1R 59, 2R 3-4). Appellant did not appeal from the judgment of conviction (2R 106) and now alleges that he did not know of his statutory and constitutional right to appeal (1R 3).

Application for writs of habeas corpus to the Superior Court of Marin County and the California Supreme Court were denied on November 20, 1964, and February 17, 1965, respectively (1R 6).

B. Proceedings in the Federal Courts

Appellant filed a petition in forma pauperis for a writ of habeas corpus in the District Court on March 24, 1965 (1R 1). On March 30, 1966, the petition was denied (1R 59). On April 29, 1966, Judge Zirpoli granted appellant's application for certificate of probable cause and for leave to appeal in forma pauperis (1R 71). On that same date appellant filed a notice of appeal to this Court (1R 72).

STATEMENT OF FACTS

An evidentiary hearing on the petition for writ of habeas corpus held in the United States District Court for the Northern District of California before Judge Zirpoli on July 8, disclosed the following evidence

which is contained in Volume II of the Transcript of Record.

Appellant was arrested by the Los Angeles Police Department on Saturday afternoon, May 10, 1958, and detained at the Newton Street substation pending transfer to the city jail (2R 6-9). That Saturday evening he was moved to the city jail and remained there until Tuesday afternoon, May 13, 1958 (2R 9, 22). Throughout his detention, appellant was treated as an ordinary prisoner. He received meals at the regular hours and participated in the normal routine of the city prison (2R 13-15).

On Tuesday morning, May 13, at approximately 10:00 or 11:00 a.m., he was taken from his cell and given a polygraph examination (2R 16). At the conclusion of this test he was immediately taken to an interrogation room by the investigating officers (2R 16-17). The investigating officers, Williams and Seiger, and the appellant were the only ones present at that time (2R 124). During this interrogation, which lasted approximately two hours, he confessed his active participation in the crimes of which he was ultimately convicted - murder, robbery and attempted robbery (2R 18, 159).

Appellant was returned to the Newton Street substation later that same afternoon (2R 22). During

this transfer he was taken to the vicinity of Central Avenue and 22nd Street and asked to identify the liquor store in which the murder had occurred (2R 38-39, 128-130, 168). Appellant complied with the officers' request and identified the correct location. On arriving at the Newton Street substation, appellant was again subjected to a question and answer interrogation wherein he immediately rendered a second confession. This interrogation was transcribed by a stenographer and initialed and signed by appellant (2R 22-23, 88, 132, 170-171).

Appellant was not advised of his constitutional right to remain silent nor his right to obtain counsel (2R 24, 136, 137). He had not been arraigned nor taken before a magistrate during the three days he was in custody prior to volunteering his confession (2R 193). At the time of his arrest appellant was 18 years of age and had a junior high school education (2R 30, 25). After leaving school he had served over two years in the Navy until June 29, 1957 (2R 26, 29, 99). He had had prior experience with law enforcement officials as the result of two convictions for larceny by court-martial while in the armed services (2R 27, 101).

In addition to the uncontested facts stated above, evidence pertaining to certain other allegations

of appellant was produced at the evidentiary hearing.

Appellant alleged that he was physically mistreated by the investigating officers during the course of the original interrogation and during transportation to the substation after his initial confession (2R 17, 33-34, 40, 65-67). Officers Williams and Seiger, who were the only officers implicated, appeared at the evidentiary hearing. Their testimony specifically contradicted all of the appellant's allegations of physical brutality (2R 126, 134, 137, 166, 168, 173). The District Court thereupon found that the appellant was not subjected to any physical brutality (1R 62-63).

Officer Williams testified that in 1958 it was the policy of the Los Angeles Police Department that it was necessary to get permission of the investigating officer assigned to the case before anyone other than attorneys and bail bondsmen could talk to a prisoner (2R 115-116, 156, 161-163). At that time it was also the policy of the police department to arraign a prisoner on a charge as soon as the investigation was completed (2R 116).

Appellant also testified at the evidentiary hearing that he had made requests to telephone his father after being taken into custody (2R 6, 8, 10, 16, 17, 25, 77). However, both Officers Williams and Seiger flatly

denied that any such request was ever made to them (2R 130, 135, 167, 174); and appellant admitted that he had made no mention in his lengthy testimony at the trial of the alleged phone requests (2R 51-52).

APPELLANT'S CONTENTIONS

1. Prolonged confinement of petitioner, an uneducated youth, without formal proceedings and without communication with the outside world rendered the self-incriminating statements involuntary.

2. Failure to advise petitioner of his rights to silence and counsel augments the involuntary character of the self-incriminating statements.

3. The psychological pressure on petitioner of having to make a life or death decision adds even more weight to the involuntary character of the self-incriminating statements.

4. The denial of petitioner's requests to telephone his father violates the clear-cut prohibition against denying access to outside assistance.

(a) Absence of corroborating evidence is not grounds for pre-emptorily disregarding petitioner's testimony that he had requested to telephone his father.

(b) Even if there were no actual denial of access to the outside world, petitioner's

isolation from it necessarily created adverse psychological pressures.

SUMMARY OF APPELLEE'S ARGUMENT

The District Court properly denied the writ because the totality of the circumstances surrounding appellant's confession in 1958 does not indicate that it was involuntary and therefore inadmissible.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED THE WRIT BECAUSE THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING APPELLANT'S CONFESSION IN 1958 DOES NOT INDICATE THAT IT WAS INVOLUNTARY AND THEREFORE INADMISSIBLE.

The district court denied the petition for writ of habeas corpus on the ground that appellant had failed to carry the burden of proof of his allegation that admission of his confession in the trial court was error because it had not been made freely and voluntarily and without compulsion of any sort. Wilson v. United States, 162 U.S. 613 (1895). That finding of fact by the district court should not be set aside unless this reviewing court determines that it is clearly erroneous. Fed. R. Civ. P. 52(a). Davis v. Johnston, 157 F.2d 64 (9th Cir. 1946), cert. denied 331 U.S. 813 (1947); Price v. Johnston, 144 F.2d 260 (9th Cir. 1944), cert. denied 323 U.S. 789 (1944); and Kelly v. Johnston, 128 F.2d 793 (9th Cir. 1942), cert. denied 317 U.S. 699 (1943).

It was held in Gallegos v. Colorado, 370 U.S. 49 (1962), that determination of whether a confession is involuntary so as to be inadmissible in a state court under the due process clause of the Fourteenth Amendment involves close scrutiny of the facts of the individual case and must be based upon a

totality of the circumstances.

In Culombe v. Connecticut, 367 U.S. 568, 601-602 (1961), the Court pointed out that no single test for constitutionally impermissible interrogation by state law enforcement officers in obtaining confessions exists - neither extensive cross-questioning nor undue delay in arraignment nor failure to caution the prisoner nor refusal to permit communication with friends and legal counsel. Each of these factors, in company with all the surrounding circumstances - the duration and conditions of detention, the manifest attitude of police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control - is relevant. The ultimate test is the voluntariness of the confession. An examination of these factors will show that appellant has failed to prove that his confession was involuntary in view of the evidence and applicable court decisions.

1. Cross-Questioning

Appellant was questioned only on Saturday for two to three hours (2R 7-8) and again on Tuesday for two more hours before signing the original confession. Both of these interrogations were conducted during the daytime and in accordance with existing

police policy that only the investigating officers, Sergeant Williams and Sergeant Seiger, were present. As a result, the cases cited by the appellant can be distinguished on the facts.

In Spano v. New York, 360 U.S. 315 (1959), the confession was secured following a massive interrogation involving a veritable regiment of officials for 8 straight hours throughout the night. The confession in Davis v. North Carolina, 384 U.S. 737 (1966), was obtained following police interrogation conducted at various times extending over a 16-day period of confinement. This decision, incidentally, is the only new case contained in appellant's brief which had not been previously cited by him or considered by the district court in its decision.

2. Delay in Arraignment

The policy of the Los Angeles Police Department in 1958 was to arraign a prisoner on the charge as soon as the investigation was complete. This, of course, was not a fixed time and in appellant's case he was not arraigned until after he had been in custody for three days, during which time he confessed.

Although there is a strict federal policy of exclusion of all confessions obtained by federal

officers during a period of illegal detention of a suspect prior to his arraignment [McNabb v. United States, 318 U.S. 332 (1942)], voluntary confessions secured by state officers during such a period prior to prompt arraignment may be admitted in state prosecutions without violating any of the prisoner's constitutional rights.

> "The bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained. Brown v. Allen, 1953, 344 U.S. 433. . . . Neither does . . . the failure of state authorities to comply with local statutes requiring that an accused promptly be brought before a magistrate. Fikes v. State of Alabama, 1957, 352 U.S. 191. . . ."

Crooker v. California, 357 U.S. 433, 437, decided the same year as this case (1958).

3. Failure to Caution Prisoner

Appellant cites Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), to support his contention that his confession was involuntary. However, in Johnson v. New Jersey, 384 U.S. 719 (1966), the Supreme Court has held that

the Miranda and Escobedo decisions are not to be applied retroactively. Therefore, the mere failure in 1958 of police officers to advise appellant of his rights to silence and to counsel in accordance with the restrictive standards set out in those later decisions would not be sufficient to render his confession involuntary. See Ashcraft v. Tennessee, 322 U.S. 143 (1943), for the standards previously enunciated by the Supreme Court and effective in 1958.

4. Communication with Legal Counsel and Family

Appellant's allegations that he had asked for and been refused permission to telephone his father were contradicted by the testimony at the evidentiary hearing of the two police officers who could be identified and were available seven years after his trial. Officers Williams and Seiger flatly denied that appellant had ever asked them to be allowed to telephone his father. It is noteworthy that, in accordance with police policy at that time, these officers were the investigating officers on the case and as such were the only ones authorized to talk with the appellant without special permission. They were with him for several hours on two occasions. Furthermore, during his lengthy testimony at the trial, appellant made no mention of the alleged phone requests (2R 51-52).

Appellant also admitted that he never asked to call an attorney or anyone else in his family (2R 15, 51-52).

In Haynes v. Washington, 373 U.S. 503 (1963), the Court possessed independent evidence establishing the existence and denial of petitioner's requests to telephone his wife. As a result, the Court there did not face the problem of determining whether the petitioner's own testimony would be sufficient to establish the existence of impermissible police conduct which would render inadmissible the written confession ultimately obtained. Moreover, the Court attributed significance to the failure of the state to contradict testimony of the defendant that the police would not permit him to telephone his wife until after he had made a written confession.

In this case, Officer Seiger specifically denied that either he or Officer Williams had ever at any time told appellant that he would not be allowed to talk to anyone until such time as he satisfactorily answered the questions put to him by interrogating officers (2R 189-90). In addition, appellant has admitted that, following his confession, he asked Sergeant Williams not to call his father or any of his other relatives (2R 80-82).

5. Duration and Conditions of Confinement

Appellant was in custody for three days prior to his confession. He was interrogated twice during the daytime for not more than three hours each time. At all other times he was treated as an ordinary prisoner. He received meals at the regular hours and participated in the normal routine of the city prison (2R 13-15).

Although appellant alleged some relatively mild physical abuse or mistreatment by the investigating officers, both officers flatly denied it. The District Court found upon consideration of the evidence that appellant had not been subjected to any physical brutality (1R 62-63).

6. Manifest Attitude of Police toward Prisoner

Following the appellant's original confession, Officer Williams cautioned him, "I warn you to consider this when you make a statement like that because we believe in being square." (2R 80:25-81:2), and reminded him that his father might be concerned about him. Appellant replied that his father wouldn't be likely to worry and requested the officers not to say anything to his father or other relatives. However, appellant did indicate that he wanted to return some property to his landlady. The police offered to take it to her themselves if she couldn't be reached by telephone,

and this was done (2R 131).

Thereafter, appellant was returned to the substation where he rendered the second confession. During the transfer he was taken to the vicinity of the crime and asked to identify the store in which the murder had occurred. He complied with the officers' request and identified the correct location. At appellant's request, the officers did not take him into the store where other people were present.

Another transcribed portion of the interrogation said (2R 98:24-99:1):

> "Q. We handled you guys pretty good, haven't we?
>
> "Unidentified voice: (Unintelligible statement.)
>
> "Mr. McFarland: I wish the Judge would handle me like that."

Sergeant Seiger also testified that the relationship between appellant and Williams and himself was nothing but the very best and that appellant had been cooperative with them (2R 189).

7. Physical and Mental State of Prisoner

At the time of his arrest, appellant was 18 years of age and had a junior high school education. After leaving school he had served over two years in

the Navy and during that time he had been twice court-martialed and convicted of larceny.

As a result, he was far more sophisticated than the appellants in either Haley v. Ohio, 332 U.S. 596 (1947), where a 15-year-old boy was subjected to prolonged questioning for five days; or Gallegos v. Colorado, 370 U.S. 49 (1962), where a 14-year old boy was detained for five days without being permitted to see his parents or an attorney and was not promptly brought before the juvenile court. Accordingly, the district court found that appellant's will had not been overborne at the time he confessed (1R 67). Lynumn v. Illinois, 372 U.S. 528 (1963).

CONCLUSION

Appellee submits that the finding of the district court that the totality of the circumstances surrounding appellant's confession in this case was not involuntary and, hence, its admission into evidence was not a violation of appellant's right to due process under the Fourteenth Amendment was not clearly erroneous. The finding is supported by the evidence and cases cited above and, as a result, this Court should not reverse the order denying the petition for writ of habeas corpus.

It would not be fair to the states nor to the public to vacate judgments as old as this one on the

basis of evolving constitutional standards which could not have been reasonably anticipated by the police at the time they acted, particularly since the standards enunciated by the United States Supreme Court in Culombe v. Connecticut, supra, adequately protect the interest of the integrity of the fact finding process from the unreliability of involuntary confession. Johnson v. New Jersey, 384 U.S. 719 (1966). To hold otherwise would run counter to the Supreme Court's course in Johnson v. New Jersey, in which the desirability of finality in criminal judgments comporting with current constitutional standards is recognized. The more recent guidelines which have since been laid down in Miranda and other cases will serve as standards for the interrogation of suspects by the police in the future.

It is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

Dated: January 31, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

Joyce F. Nedde

CR SF
65-512

JOYCE F. NEDDE
Deputy Attorney General

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: January 31, 1967

JOYCE F. NEDDE
Deputy Attorney General